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No. 99-22

In The

Supreme Court of the United States

STATE TAX COMMISSION OF
THE STATE OF MISSISSIPPI,

Petitioner,

v.

H.J. WILSON CO., INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Mississippi

H.J. WILSON CO., INC.'S, BRIEF IN OPPOSITION TO MISSISSIPPI TAX COMMISSION'S PETITION FOR A WRIT OF CERTIORARI

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13pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

1. The decision of the Mississippi Supreme Court rests on a Mississippi sales and use tax rule promulgated by Petitioner itself – an adequate and independent state law ground which is beyond the scope of this Court's review 3

2. Postage is an obligation of the United States which cannot be subjected to state taxes 5

CONCLUSION 11

TABLE OF AUTHORITIES

Page

FEDERAL CASES

American Bank & Trust Co. v. Dallas County, 463 U.S. 855 (1983) 7

Amer. Ry. Express v. Kentucky, 273 U.S. 269 (1926) 5

Banks v. Mayor, 74 U.S. 16 (1869)..... 7

Bank v. Supervisors, 74 U.S. 26 (1868)..... 7, 10

Michigan v. Long, 463 U.S. 1032 (1982)..... 3, 5

Rockford Life Insurance Co. v. Illinois Department of Revenue, 482 U.S. 182 (1987) 7, 8, 9

Smith v. Davis, 323 U.S. 111 (1944) 8, 9, 10, 11

STATE CASES

Newark City Bank v. Assessor of Fourth Ward, 30 N.J.L. 13 (1862)..... 7

FEDERAL STATUTES

18 U.S.C. § 8 (1999) 2, 6, 7, 10

31 U.S.C. § 3124 (1999) 3, 5, 6, 7

Act of June 30, 1864, 13 Stat. 218 (1864) 8, 9

ADMINISTRATIVE RULES

Mississippi Sales and Use Tax Rule 51(b), Code Miss. R. 48 090 001-43 (1997) 2, 3, 4, 5

STATEMENT OF THE CASE

The issues raised by Petitioner, State Tax Commission of the State of Mississippi (the "Tax Commission" or "Petitioner"), in its Petition for Writ of Certiorari center around payment of use tax by Respondent, H.J. Wilson Co., Inc., a Louisiana corporation doing business as Service Merchandise ("SM" or "Respondent"), on United States postage. SM operated, during the period relevant to this litigation, six retail stores in the State of Mississippi. As part of this operation, SM contracted to have advertising material such as catalogs printed both inside and outside of Mississippi and delivered via the United States Post Office to Mississippi residents. Mississippi imposed use tax on the cost of such mailings, including postage charges, for the period June 1, 1986 through June 30, 1992 (the "Tax Period at Issue").

After unsuccessfully administratively appealing the assessments of tax on postage – and the overall assessments on First Amendment grounds – to the Tax Commission's Board of Review, to the Tax Commission itself, and seeking relief in the Chancery Court of Hinds County, Mississippi, SM appealed to the Mississippi Supreme Court. That court correctly held that the statute under which SM's publications were taxed violated the First Amendment to the United States Constitution. App. 49.* With regard to the tax paid by SM on postage, the Mississippi Supreme Court held that Mississippi Sales and Use

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* Citations to "App. ___" refer to the Appendix submitted with the State Tax Commission of Mississippi's Petition for Writ of Certiorari. Citations to "Pet. ___" refer to the text of that Petition.

Tax Rule 51(b), promulgated by Petitioner itself, effectively exempted postage from tax. App. 48. In so holding, the court quoted the Tax Commission's agent, Mr. Eddie Beck, who testified at trial as follows:

> Q: It effectively exempts postage from the gross proceeds of the sale, does it not?
>
> A: Well it does if you are taking possession of that postage.

App. 48.

The Mississippi Supreme Court went on to observe that "the Commission's position on appeal, that sales tax can be imposed if the purchaser does not take possession of the postage prepaid printed material is illogical" and rejected the tax imposed on postage purchased by SM as violative of Rule 51(b). App. 48.

In addition, the court recognized that federal law also prohibited taxation of all obligations of the United States and that postage stamps were specifically defined in the United States Code as obligations of the United States government. App. 48 (citing 18 U.S.C. § 8 (1999)). "As a result, [the court concluded], 'we hold that the trial court erred by upholding the Commission's imposition of the use tax on Service Merchandise for the portion related to postage costs incurred by Service Merchandise to have the catalog suppliers delivered by the United States Postal Service and order a refund to Service Merchandise for the portion of the use tax paid that represented the imposition of the use tax on postage costs plus interest and post-payment interest.' " App. 49.

REASONS FOR DENYING THE WRIT

1. The decision of the Mississippi Supreme Court rests on a Mississippi sales and use tax rule promulgated by Petitioner itself – an adequate and independent state law ground which is beyond the scope of this Court's review.

This Court has "long recognized that 'where the judgment of a state court rests on two grounds, one of which is federal and non-federal in character, [its] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.' " *Michigan v. Long*, 463 U.S. 1032, 1038 (1982) (quoting *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)). The Mississippi Supreme Court's holding that the Tax Commission's imposition of tax on postage charges paid by Respondent was erroneous rests upon two such grounds – one state, one federal. The federal ground is 31 U.S.C. § 3124(a) (1999), which exempts federal obligations from tax and thus, as the court correctly determined, insulates SM from tax on the postage it paid to mail marketing materials during the Tax Period at Issue. App. 48-49. However, the second basis for that court's decision is derived purely from state law, namely Mississippi Sales and Use Tax Rule 51(b), promulgated by Petitioner, which expressly exempts postage from tax. App. 47-48. The Supreme Court of Mississippi specifically addressed the Mississippi State Tax Commission's argument that "the reason that Rule 51(b) is not applicable is because Service Merchandise did not take actual physical possession of the catalogs and advertising flyers, but instead paid the

printer the full purchase price, including delivery," and rejected it out of hand:

> There is no specific exemption stated in the Mississippi Sales Tax Law that provides for an exemption for the sale of postage stamps. However, the Mississippi State Tax Commission, in its Rules and Regulations adopted by the Sales and Use Tax Division, has adopted Rule 51 governing taxation of the printing industry. Rule 51 provides the following:
>
> *(b) Where stamped envelopes or post cards are purchased and printed for the customers, the amount of the postage may be deducted from the total charge.*
>
> Code Miss. R. 48 090 001-43 (1997) (emphasis added). Furthermore the State Tax Commission's agent, Eddie Beck, at trial in the lower court, when questioned about the effect of Rule 51(b) conceded that there was no sales tax imposed on postage . . .
>
> *Mr. Beck's response admits that sales tax is not imposed on postage, but we hold that his attempted distinction, and also the Commission's position on appeal, that sales tax can be imposed if the purchaser does not take possession of the postage pre-paid printed material is illogical* and amounts to a situation where sales tax can be imposed on a postage stamp which is prohibited by federal statutes.

App. 47-48 (emphasis supplied).

While this is a use tax case, the Mississippi Supreme Court properly noted that in Mississippi, the first state in the union to adopt a sales and use tax scheme, sales and use taxes – and thus Sales and Use Tax Rule 51(b) – in

that state are complimentary and applicable to precisely the same transactions. App. 46-47. While the Supreme Court of Mississippi in its opinion went on to emphasize that federal law also prohibits imposition of tax on postage in any form, its reliance on Rule 51(b) in this case provides an adequate and independent state law ground for its decision which is not subject to the review of this Court. *Long*, 463 U.S. at 1038.[1] For that reason alone, this Court should refuse Petitioner's Petition for Writ of Certiorari.

2. Postage is an obligation of the United States which cannot be subjected to state taxes.

Reflecting the Petitioner's inability to produce a single authority supporting the imposition of state taxes of any kind on postage, the Supreme Court of Mississippi correctly held that postage is an obligation of the United States government which cannot be taxed. App. 49. As the Supreme Court of Mississippi observed, the United States Code explicitly prohibits the taxation by states of such obligations. 31 U.S.C. § 3124(a) (commonly referred

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[1] Given the plain command of Rule 51(b), the Mississippi Supreme Court effectively had no choice but to reject the tax imposed by Petitioner. To have upheld the use tax or postage would have amounted to a refusal to enforce the laws and regulations of the state of Mississippi. Such an "arbitrary or capricious exercise of power [would be] in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights' " and would thus violate the Due Process Clause of the United States Constitution. *Amer. Ry. Express v. Kentucky*, 273 U.S. 269, 273 (1926).

to as "Section 3701" after the underlying public law) provides:

> *Stocks and obligations of the United States government are exempt from taxation by a state or political subdivision of a state.* The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax, except – (1) a non-discriminatory franchise tax or another non-party tax instead of a franchise tax, imposed on a corporation; and (2) an estate or inheritance tax.

31 U.S.C. § 3124(a) (1999) (emphasis supplied). The Petitioner has properly conceded that postage is included in the definition of "obligation" embodied in the United States Code at 18 U.S.C. § 8. That law explicitly includes stamps in its list of such obligations:

> The term 'obligation or other security of the United States' includes all bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificate of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, issued under any Act of Congress, and canceled United States stamps.

18 U.S.C. § 8 (1994).

While Petitioner states categorically that "the use of this definition [in 18 U.S.C. § 8] would be inconsistent with the established law in this area." This Court and others

have specifically held that many of the "obligations" set out in 18 U.S.C. § 8 are exempt pursuant to § 3124. Thus for example, certificates of indebtedness, treasury notes, and United States securities are all exempt from state taxation. *Banks v. Mayor*, 74 U.S. 16 (1869) (certificates of indebtedness); *Bank v. Supervisors*, 74 U.S. 26 (1868) (superseded by statute on other grounds as stated in *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855 (1983) (national bank notes)); *Newark City Bank v. Assessor of Fourth Ward*, 30 N.J.L. 13 (1862) (stocks and securities of the United States).

In the most recent case to address the breadth of 31 U.S.C. § 3124, this Court left little doubt that direct and certain obligations like postage do fall within the ambit of "obligations" protected from state tax by that statute. *Rockford Life Insurance Co. v. Illinois Department of Revenue*, 482 U.S. 182, 187 (1987). Noting that that term refers "only to obligations or securities of the same type as those specifically enumerated," this Court held that "Ginnie Mae" certificates which bundled home mortgages to create liquid securities were not exempted from the state taxes by Section 3124 because, unlike the postage at issue in this case, they do not impose a direct obligation on the United States:

> GNMA certificates are fundamentally different from the securities specifically named in the statute. Most significantly, they are neither direct and/or certain obligations of the United States. As the certificate provides, it is the issuer that bears the primary obligation to make timely payments – the United States' obligation is secondary and contingent. In short the United States is the guarantor – not the obligor. This

> distinction is more than adequate to support our conclusion that Ginnie Mae's do not qualify as 'other obligations of the United States' for the purposes of this statute.

Rockford, 482 U.S. at 187. By contrast, the obligations at issue in this case – U.S. postage – impose a direct obligation on the United States government.

The distinction articulated by this Court in *Rockford Life Insurance Co.* thus serves only to underscore the obvious – that in excluding "obligations" from state taxation, Congress intended to protect all direct obligations of the United States, including postage, from state and local taxation.

Certainly that interpretation is supported by an analysis of the legislative history of § 3701, which this Court carefully articulated in the other case relied on by Petitioner, *Smith v. Davis*, 323 U.S. 111 (1944). In determining the reach of that statutory exemption, this Court, in *Smith*, properly subjected "[t]he seven statutory exemption provisions from which § 3701 was derived" to careful analysis. *Id.* at 117. In so doing, it specifically noted that the Act of June 30, 1864, 13 Stat. 218, exempting "all bonds, treasury notes, and other obligations of the United States" was the "provision [coming] closest to the wording of § 3701." *Id.* at 117 n. 9. This Court went on to specifically set out the language of that predecessor statute which leaves no doubt that Congress has always intended to include postage within the "other obligations" exempt from state tax:

> This act, moreover, obviously used the word 'obligation' throughout to refer to written documents, making provisions relating to counterfeiting, altering, printing and photographing them. And in Section 13, the Act defines the words 'obligation or other security of the United States,' as used in this Act, to include and mean 'all bonds, coupons, national currency, United States notes, Treasury notes, fractional notes, checks for money for authorized officers of the United States, certificates of indebtedness, certificates of deposit, *stamps, and other representatives of value whatever denomination, which have been or may be issued under any act of Congress.*

Smith, 323 U.S. at 117 n. 9 (deriving the meaning of § 3701 by analyzing 13 Stat. 218). This Court's prior analysis of § 3701 thus leaves no doubt that the "other obligations" protected by that provision have always encompassed postage.

Petitioners essentially base their entire Petition for Certiorari on dicta in *Smith* noting that instrumentalities heretofore determined to be exempt from state taxation:

> Have been characterized by (1) written documents, (2) the bearing of interest, (3) a binding promise by the United States to pay specified sums at specific dates and (4) specific Congressional authorization, which also pledge the faith and credit of the United States' support of the promise to pay.

Smith, 323 U.S. at 114. This analysis in *Smith* applied not to the federal statute at issue but to the doctrine of intergovernmental immunity. *Id.* In 1987, the *Rockford Life* court similarly relegated its analysis of these characteristics to an intergovernmental immunity argument. 482 U.S.

at 189. Nevertheless, Petitioners point out – correctly – that postage does not bear interest. Yet, nowhere has this Court ever suggested that the qualities listed in *Smith* as mere characteristics of obligations held exempt are mandatory even in the governmental immunity context, much less in the interpretation of Section 3701, to which the *Smith* characteristics have never been applied *Id.* While typically most obligations will bear interest, there could be no doubt that postage represents an obligation of the United States to provide certain valuable services even if postage were not expressly included in the United States Code's definition of federal "obligations." 18 U.S.C. § 8. Indeed this Court, in the only other case to address Section 3701's (or its predecessors') application to non-interest bearing obligations, held that bank notes issued during the Civil War which did not bear interest were exempt from state and local taxation under federal law. *Bank v. Supervisors*, 74 U.S. 26, 31 (1865) (interpreting one of the predecessor statutes to Section 3701 discussed at length by this Court in *Davis*, 323 U.S. at 117).

The language of *Smith* can only be properly read in the context of its facts, which are utterly inapplicable to this case. 323 U.S. at 111. *Smith* did not involve any sort of written security or direct obligation of the United States. It involved nothing more than a claim by partners engaged in the construction business who held on their books an account receivable totaling $29,831.10 for certain construction projects performed for the United States Army. 323 U.S. at 112. It was this open account that the *Smith* plaintiffs attempted to declare a tax-exempt obligation. Plainly, an accounts receivable is a far cry from an obligation by the United States of America to provide

postal services, as represented by a postage stamp or similar postal mark or document. As the *Smith* court observed, the accounts receivable at issue was "not evidenced by any written document whereby the United States . . . promised to pay . . . ; nor [was] there any binding acknowledgment by the United States of the correctness of the claim." 323 U.S. at 114. This Court further emphasized that the receivable was not itself binding on the United States and might be subject to defenses or counterlaims. *Id.* None of these concerns are at all relevant to postage, which plainly imposes a direct obligation on the United States. Nothing in *Smith* suggests that U.S. postage obligations are somehow excluded from the obligations exempt from taxation under the statute and the parallel doctrine of intergovernmental immunity.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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